U.S. Department of Labor

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Issue Date: 23 March 2006

CASE NO: 2005-LHC-774

OWCP NO: 07-16989

IN THE MATTER OF

HAROLD BENOIT
Claimant

v.

COIL TUBING SERVICES,
Employer

APPEARANCES:

V. Jacob Garbin, Esq.
On Behalf of Claimant

Anne Derbes Keller, Esq.
On Behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Harold Benoit (Claimant) against Coil Tubing Services (Employer). The formal hearing was conducted in Covington, Louisiana on January 17, 2006. Each party was represented by counsel, and each presented documentary evidence, examined and

cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1 and 2, 4 and 5, and 7-14, and Employer's Exhibits 1-18. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of the accident is May 22, 2003 (Employer denies that the accident resulted in any lost time from work);
2. Whether the injury was in the course and scope of employment is disputed.
3. An employer/employee relationship existed at the time of the alleged accident.
4. The date the employer was advised of the injury was May 22, 2003.
5. Notice of Controversion was filed January 11, 2005.
6. An informal conference was held on November 15, 2004.
7. The average weekly wage at the time of injury is disputed.
8. Nature and extent of disability is disputed:
    (a) Temporary total disability is disputed;
    (b) Temporary partial disability is disputed; and
    (c) Permanent Total/Death benefits are disputed.
9. Benefits paid?
10. Medical benefits paid?
11. Date of maximum medical improvement is disputed.

Issues

The unresolved issues in this proceeding are:

1. Whether Claimant sustained a compensable injury;
2. Nature and extent of injury, if any;
3. Nature and extent of disability, if any;

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[1] The parties were granted time post hearing to file briefs. Both parties filed a brief.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

4. Claimant's entitlement to past and/or future compensation and/or medical benefits, if any;
5. Average weekly wage;
6. Claimant's claim for attorney's fees

Statement of the Evidence

Harold Benoit

Claimant testified that he was born on December 29, 1954 and has about a seventh grade education; Claimant stated that he can read and write very little.

Claimant first worked for Employer in 1998; he departed for a time and returned in 1999. On May 22, 2003, while Claimant was at work for Employer, a wrench fell from the deck above Claimant and struck his hard hat and right forehead. Claimant stated that as a result he was dazed for a while and had a knot on his head, but no laceration. Claimant stated that his head was hurting immediately following the accident and that he asked his co-worker's if he was bleeding. Claimant left the work floor and went to take a shower and find some pain medicine. Claimant testified that a few of his co-workers told him not to make a big deal out of it and not to fill out an accident report because it would only make things bad for the company. Despite this, Claimant did fill out an accident report with the help of the company man who told Claimant that he should file a report in case his injury bothered him in the future.

Claimant was eventually evacuated to shore where he met George Blake, safety coordinator for Employer, and spoke via telephone to Randy Comeaux, Claimant's supervisor. Mr. Blake wanted to take Claimant to the emergency room; however, Claimant stated that he resisted going to the hospital because he was afraid of losing his job. Claimant was finally convinced to go to the Emergency Room at Our Lady of Lourdes, where he was examined and released.

After the accident, Claimant took 10 days leave before returning to work[3]. Thereafter, Claimant continued to work without any major complaint[4] until October 20, 2003.[5] Claimant testified that on October 20, 2003 he was lifting a tool box when he injured his back. Claimant has not worked since that time.

[3] Claimant stated that once he was convinced to go to the hospital, Mr. Blake told him that the company owner wanted Claimant to take some time off due to the accident.

[4] Claimant testified that he did not complain following the May 22, 2003 accident because he was afraid of losing his job. Claimant stated that in the past he had known two other employees that were injured and then no longer returned to work and he thought they were fired because of their injuries.

[5] In September 2003 Claimant did voice a complaint to Employer for low back pain.

Claimant was paid his salary through November 2003, after which he received compensation in the form of family leave and short term disability. In April 2004, Claimant was terminated for failing to return to work. (EX 14).

Following his October 20, 2003 back episode, Claimant filed a state worker's compensation claim for the injury, but was unsuccessful. Also, because Claimant alleged that his neck injury and head injury (headaches) had worsened, he filed a longshore claim in February 2004 (EX 1) regarding the May 22, 2003 incident with the wrench. Apparently, Claimant also filed a state worker's compensation claim concerning the same accident, but the claim was dismissed for lack of jurisdiction.

Following Claimant's May 22, 2003 visit to the emergency room, Claimant placed himself under the care of Dr. James Mwatibo who had been treating Claimant for hypertension.[6] Claimant saw Dr. Mwatibo on three occasions prior to his October 20, 2003 back injury. Following Claimant's second visit with Dr. Mwatibo, Claimant testified he was referred to Dr. de Alvare for his headaches, and subsequently, also referred to Dr. Granger. Claimant also saw Dr. Kaufman in Baton Rouge. For his back Claimant saw Dr. Langford and Dr. Cobb.

On October 18, 2005, Claimant testified he was in an automobile accident which aggravated his condition. Today, Claimant states that his back, head and neck hurt and that he wants to seek further medical treatment. However, Claimant acknowledged on cross-examination that he had experienced some dizziness even prior to May 22, 2003.

When questioned regarding his earnings, Claimant stated that as of May 2003 he made approximately $2,600.00 per month plus bonuses. Claimant also agreed that regarding prescription drugs, those prescribed by Dr. Cobb and Dr. Langford were related to his back injury only.

George Blake

George Blake testified at the hearing. He is Employer's Safety Coordinator, and he met Claimant on-shore when Claimant was evacuated from off-shore on May 22, 2003. Blake stated that Claimant told Blake he was "fine". Blake explained that it took about two hours to convince Claimant to go to the emergency room. At the emergency room Claimant only complained of right forehead pain; Claimant was examined and then released to full duty. Thereafter, Claimant

[6] Prior to being under Dr. Mwatibo's care, Claimant had been treated by Dr. Mwatibo's retired partner, Dr. Kinchen.

requested a few days leave and was granted permission. Blake explained that he completed the accident report regarding the wrench and did not hear anything further regarding this incident until April 2005 when he was told about the pending claim.

Randy Comeaux

Randy Comeaux also testified at the hearing. He was operations manager in 2003 and was told about Claimant's accident by Blake. Comeaux helped convince Claimant to go to the emergency room. Comeaux testified that he was told by Blake that the time Claimant took off work subsequent to the accident was for personal reasons. Comeaux stated that on May 30, 2003 Claimant returned to work and that Comeaux saw him in the shop. Comeaux also noted that part of his job duties involved him in the process of terminating employees. He stated that in all his years working for Employer he had never known an employee to be terminated for reporting an accident.

Patrick Hebert

Patrick Hebert, who was an Employer supervisor in May 2003, testified next. It was Hebert who dropped the wrench that struck Claimant. He stated that he saw the wrench hit Claimant's hard hat and then flip and strike Claimant's forehead. According to Hebert, Claimant was upset following the incident and said, "I quit." A replacement worker was called in and Claimant was sent off the rig. Hebert admitted that he laughed following the accident, and could appreciate why Claimant was irritated. Hebert also stated that previous to the accident, Claimant had inquired about a transfer from off-shore to the shop.

Raleigh Parker

Raleigh Parker was the last witness to testify at the hearing. He stated that on May 22, 2003 he was working as Employer's Quality Health Safety and Environment Director. According to Parker, following the May 22, 2003 accident, Claimant made no complaints regarding his neck or his headaches. Claimant was paid through November 2003 and was terminated in April 2004 because his family medical leave had expired and he refused to return to work. Parker also noted that the first time he became aware that a worker's compensation claim had been filed in connection with Claimant's May 22, 2003 incident, was on January 23, 2004 when he received a Notice of Mediation Conference[7] from Liberty Mutual, Employer's worker's compensation insurance carrier.

[7] This was a state worker's compensation claim that was eventually dismissed.

Medical Evidence

Doctor James Mwatibo (CX 14)

Dr. Mwatibo testified by deposition on January 12, 2006. He stated that he and his partner, Dr. Stevens, opened Pride Plaza Clinic in July 2002. The clinic was previously owned and operated by Dr. Kinchen, but when he retired Dr. Mwatibo and Dr. Stevens took over the practice and became the legal custodian of the medical records.

Dr. Mwatibo testified that he did have an independent recollection of Claimant and that he would recognize Claimant when he came to the office. He stated that he had been treating Claimant since August 2002. Dr. Mwatibo first saw Claimant on August 2, 2002; Claimant was coming in for a follow-up visit, as recommended by Dr. Kinchen before he retired, regarding hypertension. At this initial visit Claimant was on three different medications.

Dr. Mwatibo testified regarding the medical records of Dr. Kinchen (which Dr. Mwatibo reviewed as part of the regimen of care for Claimant). Medical records from January 11, 2002 reflect that Claimant came in with a chief complaint that he was having some pain now and then, but that the pain had gone down a lot. Claimant also said that his blood pressure pills were working, but he was not feeling like he used to. At the bottom of the record it stated that Claimant had been having headaches and dizziness for a long time.

On November 10, 2002 Dr. Mwatibo examined Claimant and noted in his assessment and plan that the issues were: 1)arthritis, 2)hypertension, and 3)ACTVD (arteriosclerotic cardiovascular disease). Dr. Mwatibo explained that he diagnosed ACTVD based on Claimant's medical history and noted that the condition was stable as of the time of the doctor's visit. At this visit, Dr. Mwatibo also noted that Claimant had possible degenerative joint disease (DJD). On May 28, 2003[8] when Dr. Mwatibo again examined Claimant, Dr. Mwatibo also noted that Claimant was suffering from arthritic pains to the head and bilateral shoulders. Dr. Mwatibo acknowledged that this condition of DJD was not a new condition, but rather something that Claimant had previous to the work incident[9].

[8] Between August 20, 2002 and May 28, 2003 Claimant saw Dr. Mwatibo on a number of occasions and did not complain of headaches or dizziness during this interval.

[9] Subsequent to this May 2003 evaluation, Dr. Mwatibo examined Claimant on February 13, 2003 and April 14, 2003; on both occasions Dr. Mwatibo diagnosed the Claimant as suffering from degenerative joint disease/arthritis possibly in the neck and shoulders or other joints and treated Claimant's condition with medication.

At this May 28, 2003 visit Claimant told Dr. Mwatibo that a wrench had fallen on his head from about seven feet high while he was working offshore. Claimant said that since that time he had had an episode of right eye blurry vision and was suffering from headaches. During Dr. Mwatibo's physical exam, he noticed a tender spot on the right side of Claimant's frontal temporal region.

Claimant also saw Dr. Mwatibo on July 23, 2003 and complained of continuing arthritic pain. At this time, however, Claimant noted that his headaches had resolved. On September 25, 2003, Claimant again presented with arthritic pain in the neck and shoulders, but did not mention any headaches. On December 12, 2003, however, Claimant returned to Dr. Mwatibo and complained of having headaches since May 2003. Dr. Mwatibo explained that since Claimant had first noted headaches in May 2003, which had resolved, but then returned in December 2003, Dr. Mwatibo considered this a neurological change and thus ordered CT scans to ensure that he was not missing an intracranial pathology.

A CT scan was done on Claimant on December 17, 2003. Dr. Mwatibo reviewed the report and on January 6, 2004 discussed the findings with Claimant. Dr. Mwatibo told Claimant that the CT scan showed no definite significant abnormalities, but did show a signal on the right side of the head. Given Claimant's history of trauma to that side of the head and because the radiologist recommended an MRI, Dr. Mwatibo requested an MRI. At this Doctor visit, Claimant also complained of dizziness, thus prompting Dr. Mwatibo to add an MRA, magnetic resonance imaging of blood vessels in the brain, to the MRI order. The MRA did not show any significant findings; the MRI showed a slight brightness on the left side of the head which Dr. Mwatibo noted could be age related or associated with migraines.

According to Dr. Mwatibo, who based his opinion on the history Claimant relayed to him, the headaches were time related to the event at work. In response to Employer's counsel questioning whether Claimant's history was consistent, given that Claimant stopped complaining of headaches for a time period and said they had resolved, Dr. Mwatibo explained that prior to Claimant coming to him on May 28, 2003, Claimant had not complained of headaches. Dr. Mwatibo assumed that the history given to Dr. Kinchen regarding "headaches and dizziness for a long time" may have been due to Claimant's blood pressure, which was under control by the time Claimant saw Dr. Mwatibo in May 2003. Therefore, Dr. Mwatibo did not relate the May 2003 headaches to the same cause as the January 2002

headaches[10]. Dr. Mwatibo believed that any other previous symptoms were under control and that the accident with the wrench either increased or aggravated Claimant's preexisting condition[11]. (Dr. Mwatibo, depo. 46).

Between May 20, 2003 and December 12, 2004 Dr. Mwatibo treated Claimant's headaches with medication (Flexstra DS). From May 20, 2004 through November 2004, per Dr. Mwatibo's referral, Claimant saw Dr. de Alvare, a neurologist. Dr. Mwatibo did not consider Claimant's headaches to be migraines. Dr. Mwatibo last examined Claimant on January 21, 2005.

Dr. Mwatibo was next asked to review a job description for a service technician one, which is what Claimant was employed as, and to give his opinion as to whether or not he thought Claimant, as of January 21, 2005, could perform the job qualifications. Dr. Mwatibo explained that he thought Claimant, due to his headaches, dizziness, and medication (some of which are narcotics), would be limited in his ability to lift certain weights and work from heights. Dr. Mwatibo stated that he would probably recommend that Claimant not work in an offshore environment where he could get dizzy spells and hurt himself or others. (Dr. Mwatibo, depo. 75). Dr. Mwatibo also testified that the physical requirements of a service one technician might aggravate the problem and could cause further spinal injury – if for example Claimant was to lift 100 pounds or more.

Dr. Mwatibo again stated that based on his evaluation of Claimant and Dr. de Alvare's assessment, it was Dr. Mwatibo's opinion that the wrench injury and Claimant's complaints of headaches and neck pain were related both by history and time. Dr. Mwatibo also testified that he believed the increased severity of Claimant's headaches was related to the head injury.

Our Lady of Lourdes Regional Medical Center Records (EX 2).

Claimant was seen at Our Lady of Lourdes Regional Medical Center on May 25, 2003 immediately following the accident at work. Claimant told the on-call doctor that on Thursday evening at 19:30 someone dropped a wrench from about seven feet above him. The wrench hit Claimant's hard hat and knocked it off his head. Claimant said that he was startled and bent in half, but did not lose consciousness or fall. Claimant had some areas of tenderness across the right

[10] Dr. Mwatibo did agree that if an individual were to take his/her blood pressure medication sporadically and it became uncontrolled, then this could cause hypertension headaches. Dr. Mwatibo also noted that arthritic neck pain can cause headaches.

[11] Dr. Mwatibo explained that Claimant was seeing other doctors during the time period when he did not complain of headaches (to Dr. Mwatibo), and these doctors were prescribing pain medication for Claimant which could have controlled Claimant's pain.

forehead above the brow. He was diagnosed with a contusion to the forehead and told to return if any other symptoms should develop. Claimant was not restricted from working.

Claimant returned to Our Lady of Lourdes on December 17, 2003, per Dr. Mwatibo's referral, to have a head CT scan in order to investigate Claimant's complaints of headaches. The Radiology report found no definite significant abnormalities, but did make mention of a possible zone of heterotypic gray matter at the right posterior parietal lobe. The Radiologist recommended correlation with and MRI Scan to further assess the potential abnormal finding.

Doctor Leo de Alvare (EX 7).

Dr. Mwatibo referred Claimant to Dr. Leo de Alvare for evaluation of Claimant's headaches. On May 20, 2004 Claimant first visited Dr. de Alvare. Claimant told Dr. de Alvare that he had been injured while working offshore when a wrench hit him on the right side of the forehead. Claimant said that his eye got blurry and he had severe burning pain in his eye, but no loss of consciousness. Claimant told Dr. de Alvare that the pain was severe and he could not finish his shift – instead Claimant took a nap and the next day was evacuated and went to the emergency room. Claimant stated that his symptoms included frequent headaches, blurring of his vision, neck pain, and about two weeks ago he had another episode where his right eye turned red. Claimant told Dr. de Alvare that he had episodes of dizziness and trouble sleeping. Claimant explained that after the incident, he went back to work until October 20, 2003 when he hurt his back. Dr. de Alvare noted that Claimant was no longer working, but that this seemed to be related to his back injury, not his headaches.

At this initial visit, Dr. de Alvare's impression was that Claimant had carniocervical trauma, a possible mild concussion, and a possible right eye injury. Dr. de Alvare also noted that Claimant's neck was supple and had a lost of spasm in the right sternocleidomastoid, the right scalene and the right trapezius. Claimant was given Elavil and Midrin for his headaches and told to keep a diary of his headaches. Dr. de Alvare recommended that Claimant have an EEG, which was performed on May 27, 2004, the results of which were normal.

On July 6, 2004 Claimant again saw Dr. de Alvare. According to Dr. de Alvare's notes, Claimant had not taken the Elavil that was prescribed because it made Claimant feel "yucky". Claimant also said that the Midrin did not help with his headaches, and that he continues to have dizziness and visual loss in his right eye. Claimant had not gone to see an ophthalmologist and did not keep a diary of

his headaches. Dr. de Alvare prescribed a different medication, again told Claimant to keep a diary of his headaches and to come back in six weeks.

Claimant returned to Dr. de Alvare's office on November 2, 2004. Dr. de Alvare's notes state that Claimant did not do anything that he was asked to do. He did not keep a diary of his headaches nor did he take his medication regularly. Claimant asked Dr. de Alvare if he could go back to work, and Dr. de Alvare noted that he saw no reason to keep Claimant from work, at least based on his headaches. Dr. de Alvare did report that Claimant was complaining of a lot of back pain, but that it not seem to be related to his worker's compensation injury and certainly was not related to anything Dr. de Alvare was seeing him for. Given Claimant's lack of cooperation, Dr. de Alvare did not think there was much else he could do for Claimant. He recommended that Claimant undergo a Functional Capacities Evaluation and be put back to work at whatever level the test indicated.

Less than a week later, on November 8, 2004, Claimant returned to Dr. de Alvare's office for an unscheduled visit because he was upset about the doctor's notes from the previous appointment. Claimant told Dr. de Alvare that the reason he had not taken his medication or gone to see the ophthalmologist, Dr. Azar, (as referred by Dr. de Alvare) was because worker's compensation would not pay for these things, and he could not afford to pay for them himself. Claimant told Dr. de Alvare that he would be going through litigation and hopefully things would get straightened out.

Dr. de Alvare noted that he hoped to hear from Claimant later so that he could send him to Dr. Azar.

Dr. Harold Granger

Dr. Granger was hired to do an independent medical evaluation of Claimant, specifically of his cervical spine. On May 4, 2004 Claimant was examined by Dr. Granger. Claimant relayed the history of his accident at work with the wrench; Claimant stated that his neck was twisted to the left and since then he has had lateral headaches, some vision change, a red eye on occasion, and neck pain. Dr. Granger noted that Claimant could rotate his neck in either direction about 45 degrees; however, when Dr. Granger walked over to one side, Claimant turned his head further to look at the doctor while he talked. According to Dr. Granger's notes, he felt that Claimant was not putting much effort into the various tests that the doctor was requesting. Dr. Granger did report that he noticed one eye was different than the other.

Dr. Granger noted that he thought the headaches may be migraines from the injury, but that a neurologist was needed to properly evaluate that. Regarding the cervical spine, Dr. Granger found several Waddell's signs present; however, he did not think it was a significant problem and he thought that, regarding the cervical spine, Claimant could return to full-duty work without restrictions[12]. Dr. Granger did relate that he thought Claimant's cervical spine problems were related the accident at work, but Dr. Granger did not think the problem was severe. Dr. Granger gave Claimant's spine a maximum of 5% total body partial impairment rating.

Dr. Charles Kaufman (CX 7, EX 8).

Dr. Kaufman, a neurologic consultant, was also hired to do an independent medical evaluation of Claimant on June 10, 2004. In his report, Dr. Kaufman noted that Claimant complained of constant headaches, 30 headaches in a month, ten of which would be so severe that Claimant would have to lie down. Claimant told Dr. Kaufman that nothing intensified the pain, but that sleep alleviated it. Claimant described the pain as a throbbing quality located over the right side of his head and eye, but that could be on the left side as well. Claimant expressed concern over his eyes tearing, numbness in his arms and legs, and decreased vision.

Dr. Kaufman reviewed Claimants past medical history as well as the tests and procedures that he had done regarding his headaches. Based on the MRI of the brain, which showed a solitary, tiny area of increased T2 intensity in the deep white matter of the frontal lobe on the left, Dr. Kaufman noted that a diagnosis of post concussion migraine would have to be considered and that perhaps the symptoms could be related to the May 22, 2003 accident. However, Dr. Kaufman was skeptical of the fact that Claimant's headaches have persisted without any sign of improvement and were as incapacitating as Claimant suggested. Dr. Kaufman seemed to think that Claimant's symptoms were more subjective than based on an objective abnormality. Dr. Kaufman noted that Claimant's subjective complaints did not meet the lack of objective findings from his examination. With regard to Claimant returning to work, Dr. Kaufman did not see any reason why he could not return to full duty. Dr. Kaufman did not find any disability with Claimant.

[12] It should be noted that Dr. Granger reported more than once that he was not qualified to evaluate Claimant's headaches and that a neurologist should do that.

October 20, 2003 Back Injury

For completeness of the record, Drs. Langford, Montgomery, and Cobb's medical records have been summarized below; however, both Claimant and Employer, through their counsel have stipulated that the accident at issue involves a wrench falling on Claimant on May 22, 2003. There is no evidence to suggest that Claimant's lower back complaints are related to the prior May 22, 2003 injury. In fact, Claimant has consistently told numerous doctors that he injured his back in October 2003 at work while lifting a heavy box and has not tried to link his headaches with his back injury.

Doctor Langford (EX 9)

Following his October 20, 2003 back injury, Claimant presented to Dr. Langford on October 21, 2003 complaining of low back pain. Dr. Langford's notes say that Claimant had been in pain since September 22, 2003, but that he could not pinpoint any specific incident except that he was on the job site when he first noticed the pain. Dr. Langford requested an MRI and placed patient on full duty work status as tolerated. The results of the MRI showed significant disc disease at two levels and evidence of right-sided foraminal narrowing at both. Thus, Dr. Langford referred Claimant to an orthopedist, Dr. Montgomery.

Doctor Thomas J. Montgomery, Medical Records (EX 4)[13]

Claimant first saw Dr. Montgomery, an orthopedist, on October 28, 2003 regarding low back pain. According to the medical history taken at this office visit, Claimant told Dr. Montgomery that he thought he injured his back at work on or about September 22, 2003. It was after this shift that Claimant woke up with lower back pain. Claimant reported the injury to his work supervisor on September 23, 2003. On September 25, 2003 Claimant was off his hitch and his back started to feel better. However, when he returned to work on October 2, 2003 his pain resumed. Claimant explained that on October 20, 2003 he picked up a tool out of a tool box and his pain became much worse. He also acknowledged that he had seen Dr. Langford previously, on October 21, 2003 for this complaint. On the medical questionnaire, Claimant said that he did not have an attorney for this injury.

[13] Dr. Donald Langford referred Claimant to Dr. Montgomery. The records of Dr. Langford and Dr. Montgomery were referred to by Employer's counsel in an effort to show that Claimant did not mention any headaches to Dr. Montgomery or Dr. Langford while he was being treated by them. However, I do not find this to be conclusive of anything; these two doctors were treating Claimant for a low back injury, not for headaches, thus, Claimant's failure to mention headaches to these doctors is not indicative of a lack of headaches.

Dr. Montgomery diagnosed Claimant with a lumbar strain, protruded disc. He placed Claimant on light duty and prescribed a Medrol Dosepak and Soma, and wanted to see Claimant back in two weeks.

Doctor John Cobb (EX 5)

Dr. Montgomery recommended that Claimant see Dr. Cobb regarding his back problems. On December 1, 2003 Claimant saw Dr. Cobb complaining of low back pain, which Claimant stated was related to an incident at work where Claimant was picking up a heavy box and injured his back. Claimant filled out a check list of symptoms and noted that he was suffering from headaches, dizziness, double vision, difficulty speaking, difficulty with memory, blurred vision, spots before his eyes, and shortness of breath; Claimant rated his pain as 10 out of 10.

Dr. Cobb evaluated Claimant and found symptomatic disc herniation and post-traumatic lumbar pain syndrome. Dr. Cobb recommended physical therapy three times a week for four months, and potential interlaminar nerve block at the L2-3 level. On December 22, 2003 Dr. Cobb filled out a continuing disability claim form for Claimant, noting that Claimant was unable to work pending further treatment. (EX 5, p. 41). Dr. Cobb also stated that surgery, a nerve block, was being considered. On December 29, 2003 Dr. Cobb again examined Claimant and noted that Claimant was unable to attend physical therapy or to get his selective nerve block approved. Dr. Cobb's recommendations stayed the same. As of March 3, 2004 Dr. Cobb was still declaring Claimant totally disabled due to his back condition and his need for treatment. On August 11, 2004 Claimant returned to Dr. Cobb with the same complaints. Dr. Cobb discussed a definitive surgery with Claimant and gave Claimant a no work status pending surgery. On October 27, 2004, after another visit with Claimant, Dr. Cobb's recommendations still remained the same. Dr. Cobb also referred Claimant to Dr. Hodges who recommended pursuing an EMG/NCV of the lower extremities.

Lafayette General Medical Center Records (EX 13)

Although these records were included in Employer's exhibits, the records refer to a motor vehicle accident that Claimant was in on October 18, 2005, and are irrelevant to the issue before this court regarding Claimant's worker's compensation claim for the May 22, 2003 accident at work.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the

hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, there is no dispute that on May 22, 2003 a wrench fell from above Claimant and struck his hard hat and forehead. Patrick Hebert witnessed the accident and testified at the hearing that he was the one who dropped the wrench; he said that he saw the wrench hit Claimant's hard hit and then flip and strike

Claimant's forehead. Employer was immediately put on notice that Claimant had been injured. Employer then arranged for Claimant to be evacuated and sent to the emergency room for an assessment. The emergency room records report that Claimant suffered from a laceration to the right forehead.

Based on the foregoing, I find that Claimant has established a prima facie case of compensability with regard to the injury he suffered on July 2, 2004 in that he has established that he suffered a harm and that working conditions existed which could have caused the harm.

Employer has failed to provide substantial countervailing evidence to rebut this presumption and has failed to show that Claimant's injury is not one arising out of or in the course of his employment.

Dr. Mwatibo, who was Claimant's treating physician (for the headaches and neck injury), explained in his deposition that he believed Claimant's headaches and neck pain were related to the May 2003 accident. Dr. Mwatibo also believed that the increased severity of Claimant's headaches was related to the accident.

Dr. de Alvare's findings are a little harder to interpret because he did not specifically address whether or not he believed Claimant's complaints of headaches and neck pain were related to the incident at work. However, Dr. de Alvare did initially diagnose Claimant with carniocervical trauma, a possible mild concussion, and a possible right eye injury.

Claimant was also examined by two other doctors who were hired to do independent medical evaluations. Dr. Granger evaluated Claimant's cervical spine and although he noted some skepticism as to Claimant's cooperation in the physical exam, he did state that he thought Claimant's cervical spine problems were related to the accident at work. Dr. Kaufman examined Claimant regarding his allegations of headaches and while he too was skeptical of the alleged severity of Claimant's condition, he still found that a diagnosis of post concussion migraine would have to be considered and that perhaps the symptoms could be related to the May 2003 accident.

Thus, based on the undisputed accident at work and the medical opinions expressed by Dr. Mwatibo, Dr. Granger and Dr. Kaufman (Dr. de Alvare did not express and opinion as to causation), I find that Claimant's injury was one arising out of or in the course of his employment.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In this instance, I find that Claimant has not yet reached MMI. Dr. de Alvare indicated that there was another referral that he would still recommend for Claimant, thus continuing his medical treatment. Dr. Granger and Dr. Kaufman do not specifically address MMI. Thus, I find that MMI has not been reached.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden

is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, Employer put on evidence by two different doctors, both of whom were hired to do independent medical evaluations of Claimant, that Claimant was capable of going back to work. Dr. Granger, who evaluated Claimant's cervical spine (in regard to Claimant's complaints of neck pain) on March 4, 2004, thought that Claimant could return to full duty. However, he did give Claimant's spine a total body partial impairment rating of 5 percent. Dr. Granger did find some Waddell's signs present during his examination, but he did not think they were significant. Dr. Granger also noted his skepticism of Claimant's complaints.

Dr. Kaufman performed the second independent medical evaluation of Claimant on June 10, 2004. Dr. Kaufman evaluated Claimant's headaches and noted that a diagnosis of post concussion migraine would have to be considered. However, similar to Dr. Granger, Dr. Kaufman was skeptical of the fact that Claimant's headaches had not shown any sign of improving. Dr. Kaufman did not find any disability with Claimant and thought that Claimant could return to full duty.

Claimant's treating physician, Dr. Mwatibo, on the other hand, did believe that some restrictions should be placed on Claimant's ability to work. In his deposition, Dr. Mwatibo testified that as of January 21, 2005, the date of Dr. Mwatibo's last examination of Claimant, he would not recommend that Claimant return to work in an offshore environment. Dr. Mwatibo noted that due to Claimant's headaches, dizziness and medication he should be restricted in his ability to lift certain weights and to work from heights because he could hurt himself or someone else. Dr. Mwatibo also stated that the physical requirements of a service one technician might aggravate Claimant's problems and could cause further damage to the spinal injury.

I give Dr. Mwatibo's opinion more weight than those of Dr. Granger or Dr. Kaufman. Dr. Mwatibo was Claimant's treating physician for a number of years and saw Claimant for his headaches and neck pain on numerous occasions. Dr. Mwatibo was obviously more familiar with Claimant's physical condition than Dr. Granger and Dr. Kaufman who saw Claimant only once for the limited purpose of assessing whether or not Claimant could return to work. Dr. Mwatibo's opinion is also strengthened somewhat by Dr. de Alvare, who examined Claimant three times regarding his headaches. On November 2, 2004 Dr. de Alvare noted that he did

not see any reason to keep Claimant from working, at least based on his headaches; however, Dr. de Alvare qualified this by saying that he would recommend that Claimant have a functional capacities evaluation and be put to work at whatever level the test indicated. In other words, while Dr. de Alvare does not declare Claimant permanently disabled, he does acknowledge that there may be some limitations on Claimant's ability to perform certain jobs. Lastly, I note that Dr. Mwatibo was the last physician to see and express an opinion about Claimant's ability to work offshore.

With regard to the extent of Claimant's disability, two doctors indicated that Claimant could return to full duty; two other doctors, who had been seeing Claimant on a more regular basis and who saw Claimant most recently, noted that at the very least, a functional capacities evaluation should be conducted to assess the level of work Claimant could return to. Thus, as noted above, I give Dr. Mwatibo's, Claimant's treating physician, and Dr. de Alvare's opinions greater weight than Dr. Granger or Dr. Kaufman who examined Claimant on only one occasion. Therefore, as of the date of Dr. Mwatibo's last assessment of Claimant on January 21, 2005, I find that Claimant, through his testimony and medical records, has established a *prima facie* case of disability and the burden shifts to Employer to show the existence of suitable alternative employment.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine*

Maint. Indus., Inc., 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

Employer has offered no evidence regarding suitable alternative employment. Employer may have been relying in part on the fact that Claimant returned to work following the May 22, 2003 accident and continued to work until October 20, 2003, when Claimant stopped working due to a back injury. However, it was not until December 2003 that Claimant's headaches seemed to escalate to a potentially disabling condition. It was at Claimant's December 12, 2003 visit with Dr. Mwatibo that he told the doctor that his headaches were still bothering him. Dr. Mwatibo stated in his deposition that the fact that Claimant's headaches had resolved as of July 2003 and then returned around December 2003 was indicative of a neurological change and as a result he ordered further neurological tests for Claimant.

The fact that Claimant returned to work for a time period after the accident does not preclude a finding of disability later if Claimant's condition worsens and that worsening can be related to the original May 22, 2003 accident. In this case it is Dr. Mwatibo's, Claimant's treating physician, opinion that Claimant underwent a neurological change thus accounting for his increased headaches and that these headaches were related to the May 22, 2003 accident. The three other physicians that examined Claimant regarding his headaches and neck pain all agreed that Claimant's complaints could be related to the May 22, 2003 accident. Thus, I find that the fact that Claimant's headaches did not become disabling until sometime after the May 22, 2003 accident does not preclude Claimant from recovery.

As of January 21, 2005, Claimant was declared at least partially disabled by Dr. Mwatibo, who testified that Claimant should not return to his previous off-shore work environment. Dr. de Alvare opined that a functional capacities evaluation should be conducted, thus indicating that Claimant may be limited in his ability to return to his former job position. Consequently, since Employer has offered no evidence of any suitable alternative employment for Claimant, I must find that Claimant is temporarily totally disabled as of January 21, 2005.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

In this instance, Claimant computes an average weekly wage based on Section 910(a). Claimant did work for Employer for the entire year prior to his injury, however, he cannot be considered a traditional five or six day a week worker. Claimant worked offshore and had a variable schedule that would change every week. Thus, Section 910(a) would not be the appropriate means of calculating the average weekly wage. The next step is to consider whether 10(b) can be fairly or reasonably used to calculate the Claimant's average weekly wage. Section 10(b) applies to an employee that does not work substantially the whole of the year. This Section is not applicable in this case because it has already been established that Claimant did work substantially the whole of the year. Nor has any information regarding wages of other employees in the same class been provided for consideration.

Employer, on the other hand, argues that Section 910(c) applies and calculated Claimant's average weekly wage by dividing Claimant's salary, $54,325.08 (CX 12, EX 11) from the year preceding his injury, by 52 weeks to come up with an average weekly wage of $1,044.71.

I agree with Employer that Section 910(c) applies because neither (a) nor (b) can be reasonably and fairly used to determine Claimant's average weekly wage. Section 10 (c) allows considerable latitude in determining a reasonable approximation of Claimant's wage earning capacity, and in this case both Claimant and Employer have provided identical information regarding Claimant's wages for the year prior to his injury. According to CX 12 and EX 11 Claimant's total gross wages from 2002 to 2003 were $54,325.08. This amount accurately represents Claimant's earning capacity at the time of his injury. Therefore, I adopt Employer's use of Section 10(c) and divide $54,325.08 by 52 weeks to yield an average weekly wage of $1,044.71.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen*, 16 BRBS 10.

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a Claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or District Director. *See* 33 U.S.C. § 907(c); 20 C.F.R. § 702.406. The employer is ordinarily not responsible for the payment of medical benefits if a Claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the Claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53; *Swain*, 14 BRBS at 664.

In the present case, Claimant asserts that he should be reimbursed for $2,695.61 of medical bills because they were reasonably necessary. Claimant and Employer had previously stipulated that with regard to the medical bills of St. Mary's Imaging Center and Our Lady of Lourdes, Claimant is only seeking to recover the amounts not covered by Claimant's health insurer. These amounts were $711.52 and $302.45 respectively. Claimant is also seeking to recover for his outstanding bill owed to Dr. de Alvare, totaling $191.95, and for his co-payments to Dr. Mwatibo totaling $195.00. I agree that Claimant should be reimbursed for these preceding medical bills. Employer was aware that on May 22, 2003 Claimant was injured while at work. Employer took Claimant to the emergency room where he was examined and released with instructions to follow-up if he had any other problems due to his injury. Claimant did follow-up on May 28, 2003 with his primary care physician, Dr. Mwatibo. Dr. Mwatibo then referred Claimant to Dr. de Alvare. Both doctors, in the course of treating Claimant for his complaints of headaches and neck pain, ordered radiological tests. Thus, I find that Claimant's request for medical expenses of $711.52, $302.45, $191.95, and $195.00 are owed by Employer.

Claimant also requested reimbursement for $1,294.69 of prescription drug costs. This total includes all costs of any analgesics from any physician that prescribed them. Claimant argues that these costs should be paid because Dr. Mwatibo testified that they benefited Claimant in providing pain relief. Employer, however, opposes this amount claiming that if Claimant is entitled to reimbursement, he is only entitled for the costs of prescriptions provided by Dr. Mwatibo and Dr. de Alvare, who were specifically treating Claimant for his headaches and neck pain. I agree with Employer[14]. Claimant is not entitled to reimbursement for drug costs that were prescribed by physicians who were treating Claimant for his unrelated back injury. The fact that these drugs may have benefited Claimant is of no consequence because they were not prescribed for him as a result of the May 22, 2003 accident[15]. The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980).

[14] Although I agree with Employer's argument, I do no find Employer's calculations for the prescription costs to accurately reflect the evidence provided in CX 10 and 11.

[15] Most of the additional prescriptions were prescribed by Dr. Cobb and Dr. Hodges, who were both seeing Claimant regarding his back injury.

Thus, according to CX 10, Claimant is entitled to reimbursement for prescriptions from Dr. Mwatibo, filled at CVS and totaling $197.67[16]. According to CX 11, Claimant is entitled to reimbursement for prescriptions from Dr. Mwatibo and Dr. de Alvare filled at Hebert Discount Pharmacy totaling $259.00[17].

Accordingly, I find that Claimant is entitled to past reasonable and necessary medical expenses of $1,857.59, as well as future reasonable and necessary § 7 medical expenses.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of it becoming due, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. See § 14(d), 14(e); 33 U.S.C. §914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). In this instance, Employer controverted on January 11, 2005. As stipulated, Employer had notice of the injury on the day of the accident, May 22, 2003, when Employer evacuated Claimant from offshore and sent him to the emergency room due to his injury. Therefore, Employer did not file a notice of controversion within 14 days of learning of Claimant's injury, but in as much as no compensation was due prior to the filing of the notice of controversion, a 14(e) penalty cannot be imposed.

ORDER

It is hereby **ORDERED, ADJUDGED and DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from January 21, 2005 and continuing based on an average weekly wage of $1,044.71;

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses related to Claimant's May 22, 2003 injury; specifically Employer shall reimburse or pay Claimant $1,857.59 as addressed in the section entitled "medicals", as well as §7 future medical expenses;

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[16] (7/23/03-$10.00 and $30.00, 12/04/03-$30.00, 5/21/2004 -$35.79, 12/16/03-$10.00, 1/29/04-$21.99, 3/30/04-$59.89) (CX 10).

[17] (11/12/04-$18.52, 1/06/05-$33.13 and $14.74, 1/14/05-$56.64, 1/21/05-$17.59, 5/09/05-$39.46, 6/23/05-$39.46, 7/20/05-$39.46) (CX 11).

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 23rd day of March, 2006, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge